



[Billing Code: 6110-01-P]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted four recommendations at its Sixty-sixth Plenary Session. The appended recommendations address: Special Procedural Rules for Social Security Litigation; Evidentiary Hearings Not Required by the Administrative Procedure Act; The Use of Ombuds in Federal Agencies; and Self-Represented Parties in Administrative Proceedings.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2016-3, Daniel Sheffner; for Recommendation 2016-4, Amber Williams; for Recommendation 2016-5, David Pritzker; and for Recommendation 2016-6, Connie Vogelmann. For all of these actions the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW, Washington, DC 20036; Telephone 202-480-2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591-596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see www.acus.gov. At its Sixty-sixth Plenary Session, held December 13 and 14, 2016, the Assembly of the Conference adopted four recommendations.

Recommendation 2016-3, *Special Procedural Rules for Social Security Litigation in District Court*. This recommendation encourages the Judicial Conference of the United States to develop a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). It also highlights areas in which such rules should be adopted and sets forth criteria for the promulgation of additional rules.

Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*. This recommendation offers best practices to agencies for structuring evidentiary hearings that are not required by the Administrative Procedure Act. It suggests ways to ensure the integrity of the decisionmaking process; sets forth recommended pre-hearing, hearing, and post-hearing practices; and urges agencies to describe their practices in a publicly accessible document and seek periodic feedback on those practices.

Recommendation 2016-5, *The Use of Ombuds in Federal Agencies*. This recommendation takes account of the broad array of federal agency ombuds offices that have been established since the Administrative Conference's adoption in 1990 of Recommendation 90-2 on the same subject, <https://www.acus.gov/recommendation/ombudsman-federal-agencies>. The new recommendation continues to urge both agencies and Congress to consider creating additional ombuds offices that provide an opportunity for individuals to raise issues confidentially and receive assistance in resolving them without fear of retribution. The recommendation emphasizes the importance of adherence to the three core standards of independence, confidentiality, and impartiality, and identifies best practices for the operation, staffing, and evaluation of federal agency ombuds offices.

Recommendation 2016-6, *Self-Represented Parties in Administrative Proceedings*. This recommendation offers best practices for agencies dealing with self-represented parties in administrative proceedings. Recommendations include the use of triage and diagnostic tools, development of a continuum of services to aid parties, and re-evaluation and simplification of existing administrative proceedings, where possible. The project builds on the activity of a working group on Self-Represented Parties in Administrative Hearings that is co-led by the Administrative Conference and the Department of Justice's Office for Access to Justice.

The Appendix below sets forth the full texts of these four recommendations. The Conference will transmit them to affected agencies, Congress, and the Judicial Conference of the United States. The recommendations are not binding, so the entities to which they are addressed will make decisions on their implementation.

The Conference based these recommendations on research reports that are posted at:
<https://www.acus.gov/66thPlenary>.

Dated: December 20, 2016

Shawne C. McGibbon,

General Counsel.

APPENDIX--RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2016-3

Special Procedural Rules for Social Security Litigation in District Court

Adopted December 13, 2016

The Administrative Conference recommends that the Judicial Conference of the United States develop special procedural rules for cases under the Social Security Act¹ in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). The Rules Enabling Act delegates authority to the United States Supreme Court (acting initially through the Judicial Conference) to prescribe procedural rules for the lower federal courts.² The Act does not require that procedural rules be trans-substantive (that is, be the same for all types of cases), although the Federal Rules of Civil Procedure (Federal Rules) have generally been so drafted. Rule 81 of the Federal Rules excepts certain specialized proceedings from the Rules' general procedural governing scheme.³ In the case of social security litigation in the federal courts, several factors warrant an additional set of exceptions. These factors include the extraordinary volume of social security litigation, the Federal Rules' failure to account for numerous procedural issues that arise due to the appellate nature of the litigation, and the costs imposed on parties by the various local rules fashioned to fill those procedural gaps.⁴

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The Social Security Administration (SSA) administers the Social Security Disability Insurance program and the Supplemental Security Income program, two of the largest disability

¹ 42 U.S.C. § 301 *et seq.* (2012).

² *See* 28 U.S.C. § 2072(a) (2012).

³ FED. R. CIV. P. 81(a); *see also* FED. R. CIV. P. 71.1–73 (“Special Proceedings”).

⁴ This recommendation is based on a portion of the extensive report prepared for the Administrative Conference by its independent consultants, Jonah Gelbach of the University of Pennsylvania Law School and David Marcus of the University of Arizona Rogers College of Law. *See* Jonah Gelbach & David Marcus, A Study of Social Security Litigation in the Federal Courts 127–42, 148–59 (July 28, 2016) (report to the Admin. Conf. of the U.S.).

programs in the United States. An individual who fails to obtain disability benefits under either of these programs, after proceeding through SSA's extensive administrative adjudication system, may appeal the agency's decision to a federal district court.⁵ In reviewing SSA's decision, the district court's inquiry is typically based on the administrative record developed by the agency.

District courts face exceptional challenges in social security litigation. Although institutionally oriented towards resolving cases in which they serve as the initial adjudicators, the federal district courts act as appellate tribunals in their review of disability decisions. That fact alone does not make these cases unique; appeals of agency actions generally go to district courts unless a statute expressly provides for direct review of an agency's actions by a court of appeals.⁶ However, social security appeals comprise approximately seven percent of district courts' dockets, generating substantially more litigation for district courts than any other type of appeal from a federal administrative agency. The high volume of social security cases in the federal courts is in no small part a result of the enormous magnitude of the social security disability program. The program, which is administered nationally, annually receives millions of applications for benefits. The magnitude of this judicial caseload suggests that a specialized approach in this area could bring about economies of scale that probably could not be achieved in other subject areas.

The Federal Rules were designed for cases litigated in the first instance, not for those reviewing, on an appellate basis, agency adjudicative decisions. Consequently, the Federal Rules fail to account for a variety of procedural issues that arise when a disability case is appealed to

⁵ 42 U.S.C. § 405(g) (2012).

⁶ *See Watts v. Sec. & Exch. Comm'n*, 482 F.3d 501, 505 (D.C. Cir. 2007).

district court. For example, the Rules require the parties to file a complaint and an answer. Because a social security case is in substance an appellate proceeding, the case could more sensibly be initiated through a simple document akin to a notice of appeal or a petition for review. Moreover, although 42 U.S.C. § 405(g) provides that the certified record should be filed as “part of” the government’s answer, there is no functional need at that stage for the government to file anything more than the record. In addition, the lack of congruence between the structure of the Rules and the nature of the proceeding has led to uncertainty about the type of motions that litigants should file in order to get their cases resolved on the merits. In some districts, for instance, the agency files the certified transcript of administrative proceedings instead of an answer, whereas other districts require the agency to file an answer. In still other districts, claimants must file motions for summary judgment to have their case adjudicated on the merits,⁷ whereas such motions are considered “not appropriate” in others.⁸

Social security disability litigation is not the only type of specialized litigation district courts regularly review in an appellate capacity. District courts entertain an equivalent number of habeas corpus petitions,⁹ as well as numerous appeals from bankruptcy courts. But habeas and bankruptcy appeals are governed by specially crafted, national rules that address those cases’

⁷ See, e.g., E.D. Mo. L.R. 56-9.02; Order Setting Schedule, *Donvan-Terris v. Colvin*, Civ. No. 14-5125 (E.D. Wash. April 8, 2015); E.D. Mo. L.R. 56-9.02.

⁸ See, e.g., S.D. Iowa Local R. 56(i).

⁹ During the twelve months that ended on September 30, 2014, the district courts received 19,185 “general” habeas corpus petitions and 19,146 social security appeals. Table C-2A, U.S. District Courts—Civil Cases Commenced, by Nature of the Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014, at 3–4.

specific issues.¹⁰ No particularized set of rules, however, accounts for the procedural gaps left by the Federal Rules in social security appeals.

When specialized litigation with unique procedural needs lacks a tailored set of national procedural rules for its governance, districts and even individual judges have to craft their own. This is precisely what has happened with social security litigation. The Federal Rules do exempt disability cases from the initial disclosure requirements of Rule 26, and limit electronic access of nonparties to filings in social security cases,¹¹ but, otherwise, they include no specialized procedures. As a result, numerous local rules, district-wide orders, and individual case management orders, addressing a multitude of issues at every stage in a social security case, have proliferated. Whether the agency must answer a complaint, what sort of merits briefs the parties are required to file, whether oral arguments are held, and the answers to a host of other questions differ considerably from district to district and, sometimes, judge to judge. Such local variations have not burgeoned in other subject areas in which district courts serve as appellate tribunals; this fact reflects the district courts' own recognition that social security cases pose distinctive challenges.

Many of the local rules and orders fashioned to fill the procedural gaps left by the Federal Rules generate inefficiencies and impose costs on claimants and SSA. For example, simultaneous briefing—the practice in some districts that requires both parties to file cross motions for resolution of the merits and to respond to each other's briefs in simultaneously filed responses—effectively doubles the number of briefs the parties must file. Some judges employ a

¹⁰ See R. GOVERNING § 2254 CASES U.S. DIST. CTS. 1–12; FED. R. BANKR. P. 1001–9037.

¹¹ FED. R. CIV. P. 26(a)(1)(B)(i); FED. R. CIV. P. 5.2(c).

related practice whereby the *agency* is required to file the opening brief.¹² Because social security complaints are generally form complaints containing little specificity, courts that employ this practice (known as “affirmative briefing”) essentially reverse the positions of the parties, leaving to the agency the task of defining the issues on appeal. The questionable nature of some of these local variations may be attributable in part to the fact that they can be imposed without observance of procedures that would assure sufficient deliberation and opportunities for public feedback. Proposed amendments to the Federal Rules must go through several steps, each of which requires public input. So-called “general orders” and judge-specific orders, on the other hand, can be issued by a district or individual judge with very little process.

The disability program is a national program that is intended to be administered in a uniform fashion, yet procedural localism raises the possibility that like cases will not be treated alike. Burdensome procedures adopted by some districts or judges, such as simultaneous briefing schedules, can increase delays and litigation costs for some claimants, while leaving other similarly situated claimants free from bearing those costs. Further, many of the attorneys who litigate social security cases—agency lawyers and claimants’ representatives alike—maintain regional or even national practices. Localism, however, makes it difficult for those lawyers to economize their resources by, for instance, forcing them to refashion even successful arguments in order to fit several different courts’ unique page-limits or formatting requirements.

Procedural variation can thus impose a substantial burden on SSA as it attempts to administer a national program and can result in arbitrary delays and uneven costs for disability claimants appealing benefit denials. SSA and claimants would benefit from a set of uniform

¹² See, e.g., Standing Order Gov. Dev. of Soc. Sec. Cases Assigned to Judge Conrad (W.D. Va. Jan. 1, 2005); Briefing Schedule, *Barnes v. Colvin*, Civ. No 14-482 (S.D. Tex. Sept. 3, 2014), at 1–2.

rules that recognize the appellate nature of disability cases. Indeed, several districts already treat disability cases as appeals.¹³ Many of these districts provide, for example, for the use of merits briefs instead of motions or for the filing of the certified administrative record in lieu of an answer.

The Supreme Court has recognized that the exercise of rulemaking power to craft specialized procedural rules for particular areas of litigation can be appropriate under the Rules Enabling Act.¹⁴ Yet, in recommending the creation of special procedural rules for social security disability and related litigation, the Administrative Conference is cognizant that the Judicial Conference has in the past been hesitant about amending the Federal Rules to incorporate provisions pertaining to particular substantive areas of the law. That hesitation has been driven, at least in part, by reluctance to recommend changes that would give rise to the appearance, or even the reality, of using the Federal Rules to advance substantive ends, such as heightened pleading standards that would disfavor litigants in particular subject areas. The proposals offered herein have very different purposes. Indeed, the Administrative Conference believes that rules promulgated pursuant to this recommendation should not favor one class of litigants over another or otherwise bear on substantive rights. Instead, this recommendation endorses the adoption of rules that would promote efficiency and uniformity in the procedural management of social security disability and related litigation, to the benefit of both claimants and the agency.¹⁵ Such a

¹³ See, e.g., General Order 05-15, *In re* Soc. Sec. Cases, Actions Seeking Rev. of the Comm'r of Soc. Sec.'s Final Dec. Denying an App. for Benefits (W.D. Wash. June 1, 2015); Standing Order, *In re* Actions Seek. Rev. of the Comm'r of Soc. Sec.'s Final Decs. Denying Soc. Sec. Benefits (W.D. NY Sept. 5, 2013); Standing Order for Disp. of Soc. Sec. App. (W.D. La. Sept. 2, 1994); E.D. Mo. L.R. 9.02; D. Ariz. L.R. 16.1; N.D. Oh. L.R. 16.3.1.

¹⁴ See *Harris v. Nelson*, 394 U.S. 286, 300 n.7 (1969) (inviting the Advisory Committee on Civil Rules to draft procedural rules for habeas corpus litigation).

¹⁵ This recommendation is the latest in a line of Conference recommendations focused on improving the procedures used in social security cases. See, e.g., Recommendation 90-4, Social Security Disability Program Appeals Process:

commitment to neutrality would also serve to dampen any apprehensions that the proposed rules would violate the Rules Enabling Act’s proscription of rules that would “abridge, enlarge, or modify any substantive right.”¹⁶ Rules consistent with these criteria could potentially address a variety of topics, including setting appropriate deadlines for filing petitions for attorneys’ fees, or establishing judicial extension practices, or perhaps authorizing the use of telephone, videoconference, or other telecommunication technologies. In developing such rules, the Judicial Conference may wish to consult existing appellate procedural schemes, such as the Federal Rules of Appellate Procedure and the Rules of Practice and Procedure of the United States Court of Appeals for Veterans Claims.

The Administrative Conference believes that a special set of procedural rules could bring much needed uniformity to social security disability and related litigation. In routine cases, page limits, deadlines, briefing schedules, and other procedural requirements should be uniform to ensure effective procedural management. At the same time, the new rules should be drafted to displace the Federal Rules *only* to the extent that the distinctive nature of social security litigation justifies such separate treatment.¹⁷ In this way, the drafters can avoid the promulgation of a special procedural regime that sacrifices flexibility and efficiency for uniformity in certain cases.

Supplementary Recommendation, 55 Fed. Reg. 34,213 (June 8, 1990); Recommendation 87-7, A New Role for the Social Security Appeals Council, 52 Fed. Reg. 49,143 (Dec. 30, 1987); Recommendation 78-2, Procedures for Determining Social Security Disability Claims, 43 Fed. Reg. 27,508 (June 26, 1978).

¹⁶ 28 U.S.C. § 2072(b) (2012).

¹⁷ See FED. R. CIV. P. 81(a)(6) (“[The Federal Rules], to the extent applicable, govern proceedings under [certain designated] laws, except as those laws provide other procedures.”).

The research that served as the foundation for this report focused on social security disability litigation commenced under 42 U.S.C. § 405(g). Section 405(g) also authorizes district court review of SSA old age and survivors benefits decisions, as well as other actions related to benefits. Because such non-disability appeals do not differ procedurally from disability cases in any meaningful way,¹⁸ it is the Conference’s belief that this recommendation should apply, subject to the exceptions discussed below, to all cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).

The Conference recognizes that some cases might be brought under § 405(g) that would fall outside the rationale for the proposed new rules. This could include class actions and other broad challenges to program administration, such as challenges to the constitutionality or validity of statutory and regulatory requirements, or similar broad challenges to agency policies and procedures. In these cases, the usual deadlines and page limits could be too confining. By citing these examples, the Conference does not intend to preclude other exclusions. The task of precisely defining the cases covered by any new rules would be worked out by the committee that drafts the rules, after additional research and more of an opportunity for public comment on the scope of the rules than has been possible for the Conference. It may also be necessary to include specific rules explaining the procedure for the exclusion of appropriate cases.

Recommendation

¹⁸ Further, they only constitute about four percent of total social security cases appealed to district courts annually. *See* Table C-2A, U.S. District Courts–Civil Cases Commenced, by Nature of the Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014, at 4.

1. The Judicial Conference, in consultation with Congress as appropriate, should develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). These rules would not apply to class actions or to other cases that are outside the scope of the rationale for the proposal.
2. Examples of rules that should be promulgated include:
 - a. A rule providing that a claimant's complaint filed under 42 U.S.C. § 405(g) be substantially equivalent to a notice of appeal;
 - b. A rule requiring the agency to file a certified copy of the administrative record as the main component of its answer;
 - c. A rule or rules requiring the claimant to file an opening merits brief to which the agency would respond, and providing for appropriate subsequent proceedings and the filing of appropriate responses consistent with 42 U.S.C. § 405(g) and the appellate nature of the proceedings;
 - d. A rule or rules setting deadlines and page limits as appropriate; and
 - e. Other rules that may promote efficiency and uniformity in social security disability and related litigation, without favoring one class of litigants over another or impacting substantive rights.

Administrative Conference Recommendation 2016-4

Evidentiary Hearings Not Required by the Administrative Procedure Act

Adopted December 13, 2016

Federal administrative adjudication can be divided into three categories:

(a) Adjudication that is regulated by the procedural provisions of the Administrative Procedure Act (APA) and usually presided over by an administrative law judge (referred to as Type A in the report that underlies this recommendation and throughout the preamble)¹;

(b) Adjudication that consists of legally required evidentiary hearings that are not regulated by the APA's adjudication provisions in 5 U.S.C. §§ 554 and 556–557 and that is presided over by adjudicators who are often called administrative judges, though they are known by many other titles (referred to as Type B in the report that underlies this recommendation and throughout the preamble)²; and

(c) Adjudication that is not subject to a legally required (i.e., required by statute, executive order, or regulation) evidentiary hearing (referred to as Type C in the report that underlies this recommendation and throughout the preamble).³

This recommendation concerns best practices for the second category of adjudication, that is, Type B adjudication.⁴ In these adjudications, although there is no statutory mandate to hold an

¹ See Administrative Procedure Act, 5 U.S.C. §§ 554–559 (2012). In a few kinds of cases, the “presiding employees” in APA hearings are not administrative law judges. Congress may provide for a presiding employee who is not an ALJ. See *id.* § 556(b).

² This type of adjudication is subject to 5 U.S.C. § 555 (requiring various procedural protections in all adjudication) and 5 U.S.C. § 558 (relating to licensing), as well as the APA's judicial review provisions.

³ See generally Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act (Nov. 10, 2016) [hereinafter Asimow], available at <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

⁴ Traditionally, Type A adjudication has been referred to as “formal adjudication” and Type B and Type C adjudication have been treated in an undifferentiated way as “informal adjudication.” This recommendation does not use that terminology for several reasons. First, the nature of Type B adjudication as involving a legally required hearing sharply distinguishes it from Type C adjudication and makes it feasible to prescribe best practices. Second, the term “informal adjudication” can be a misnomer when applied to Type B adjudication; in fact, Type B

“on the record” hearing,⁵ a statute, regulation, or other source of law does require the agency to conduct an evidentiary hearing. Because the APA’s adjudication provisions in 5 U.S.C. §§ 554 and 556–557 are not applicable to these adjudications, the procedures that an agency is required to follow are set forth elsewhere, most commonly in its own procedural regulations.

Type B adjudications are extremely diverse.⁶ They involve types of matters spanning many substantive areas, including immigration, veterans’ benefits, environmental issues, government contracts, and intellectual property. Some involve disputes between the federal government and private parties; others involve disputes between two private parties. Some involve trial-type proceedings that are at least as formal as Type A adjudication. Others are quite informal and can be decided based only on written submissions. Some proceedings are highly adversarial; others are inquisitorial.⁷ Caseloads vary. Some have huge backlogs and long delays; others seem relatively current. The structures for internal appeal also vary.

The purpose of this recommendation is to set forth best practices that agencies should incorporate into regulations governing hearing procedures in Type B adjudications. The procedures suggested below are highlighted as best practices because they achieve a favorable balance of the criteria of accuracy (meaning that the procedure produces a correct and consistent

adjudication is often as “formal” or even more “formal” than Type A adjudication. Finally, Type C adjudication—which can properly be referred to as “informal adjudication”—is an enormous category, consisting of many millions of adjudications each year. This type of adjudication is highly diverse and does not easily lend itself to an overarching set of best practices.

⁵ See *id.* at 7–9 (discussing the boundary between Type A and Type B adjudication).

⁶ See generally *id.* (describing the vast variety of evidentiary hearings that are not required by the APA). See also Federal Administrative Adjudication, available at <https://www.acus.gov/research-projects/federal-administrative-adjudication> (providing an extensive database that maps the contours of administrative adjudication across the federal government).

⁷ See Asimow, *supra* note 3 at 11–12, 84–88 (providing examples of inquisitorial adjudications).

outcome), efficiency (meaning that the procedure minimizes cost and delay), and acceptability to the parties (meaning that the procedure meets appropriate standards of procedural fairness).

Some of the best practices set forth in this recommendation may not be applicable or desirable for every Type B adjudicatory program. Accordingly, the recommendation does not attempt to prescribe the exact language that the agency should employ in its procedural regulations.⁸ This recommendation should be particularly useful to agencies that are either fashioning procedural regulations for new adjudicatory programs or seeking to revise their existing procedural regulations.

Recommendation

Integrity of the Decisionmaking Process

1. *Exclusive Record.* Procedural regulations should require a decision to be based on an exclusive record. That is, decisionmakers should be limited to considering factual information presented in testimony or documents they received before, at, or after the hearing to which all parties had access, and to matters officially noticed.
2. *Ex Parte Communications.* Procedural regulations should prohibit ex parte communications relevant to the merits of the case between persons outside the agency and agency decisionmakers or staff who are advising or assisting the decisionmaker.

Communications between persons outside the agency and agency decisionmakers or staff

⁸ Drafters of procedural regulations implementing these best practices may want to consult the Conference-prepared 1993 Model Adjudication Rules for guidance on language, though those rules are directed to adjudication governed by the APA. See Michael Cox, *The Model Adjudication Rules (MARS)*, 11 T.M. COOLEY L. REV. 75 (1994). The Conference has initiated a new Model Adjudication Rules Working Group to revise the model rules. See Admin. Conf. of the U.S., Office of the Chairman Model Adjudication Rules Working Group, available at <https://www.acus.gov/research-projects/office-chairman-model-adjudication-rules-working-group> for more information.

who advise or assist decisionmakers should occur only on the record. If oral, written, or electronic ex parte communications occur, they should be placed immediately on the record.

3. *Separation of Functions.* In agencies that have combined functions of investigation, prosecution, and adjudication, procedural regulations should require internal separation of decisional and adversarial personnel. The regulations should prohibit staff who took an active part in investigating, prosecuting, or advocating in a case from serving as a decisionmaker or staff advising or assisting the decisionmaker in that same case. Adversary personnel should also be prohibited from furnishing ex parte advice or factual materials to a decisionmaker or staff who advise or assist decisionmakers.
4. *Staff Who Advise or Assist Decisionmakers.* Procedural regulations should explain whether the agency permits ex parte advice or assistance to decisionmakers by staff. The staff may not have taken an active part in investigating, prosecuting, mediating, or advocating in the same case (see paragraph 3). The advice should not violate the exclusive record principle (see paragraph 1) by introducing new factual materials. The term “factual materials” does not include expert, technical, or other advice on the meaning or significance of “factual materials.”
5. *Bias.* Procedural regulations should prohibit decisionmaker bias in adjudicatory proceedings by stating that an adjudicator can be disqualified if any of the following types of bias is shown:
 - a. Improper financial or other personal interest in the decision;
 - b. Personal animus against a party or group to which that party belongs; or
 - c. Prejudgment of the adjudicative facts at issue in the proceeding.

Procedural regulations and manuals should explain when and how parties should raise claims of bias, and how agencies resolve them.

Pre-Hearing Practices

6. *Notice of Hearing*. Procedural regulations should require notice to parties by appropriate means and sufficiently far in advance so that they may prepare for hearings. The notice should contain a statement of issues of fact and law to be decided. In addition, the notice should be in plain language and, when appropriate, contain the following basic information about the agency's adjudicatory process:

- a. Procedures for requesting a hearing;
- b. Discovery options, if any (see paragraph 10);
- c. Information about representation, including self-representation and non-lawyer or limited representation, if permitted (see paragraphs 13–16), and any legal assistance options;
- d. Available procedural alternatives (e.g., in-person, video, or telephonic hearings (see paragraph 20); written and oral hearings (see paragraph 21); and alternative dispute resolution (ADR) opportunities (see paragraph 12));
- e. Deadlines for filing pleadings and documents;
- f. Procedures for subpoenaing documents and witnesses, if allowed (see paragraph 11);
- g. Opportunity for review of the initial decision at a higher agency level (see paragraph 26);
- h. Availability of judicial review; and

- i. Website address for and/or citation to the procedural regulations and any practice manuals.
7. *Confidentiality*. Procedural regulations should provide a process by which the parties may seek to keep certain information confidential or made subject to a protective order in order to protect privacy, confidential business information, or national security.
8. *Pre-Hearing Conferences*. Procedural regulations should allow the decisionmaker discretion to require parties to participate in a pretrial conference if the decisionmaker believes the conference would simplify the hearing or promote settlement. The decisionmaker should require that (a) parties exchange witness lists and expert reports before the pretrial conference and (b) both sides be represented at the pretrial conference by persons with authority to agree to a settlement.
9. *Inspection of Materials*. Procedural regulations should permit parties to inspect unprivileged materials in agency files that are not otherwise protected.
10. *Discovery*. Agencies should empower their decisionmakers to order discovery through depositions, interrogatories, and other methods of discovery used in civil trials, upon a showing of need and cost justification.
11. *Subpoena Power*. Agencies with subpoena power should explain their subpoena practice in detail. Agencies that do not have subpoena power should seek congressional approval for subpoena power, when appropriate.
12. *Alternative Dispute Resolution*. Agencies should encourage and facilitate ADR, and ensure confidentiality of communications occurring during the ADR process.

Hearing Practices

13. *Lawyer Representation*. Agencies should permit lawyer representation.

14. *Non-Lawyer Representation.* Agencies should permit non-lawyer representation.

Agencies should have the discretion to (a) establish criteria for appearances before the agency by non-lawyer representatives or (b) require approval on a case-by-case basis.⁹

15. *Limited Representation.* Agencies should permit limited representation by lawyers or non-lawyers, when appropriate (i.e., representation of a party with respect to some issues or during some phases of the adjudication).

16. *Self-Representation.* Agencies should make hearings as accessible as possible to self-represented parties by providing plain language resources, legal information, and other assistance, as allowed by statute and regulations.¹⁰

17. *Sanctions.* Agencies with the requisite statutory power should authorize decisionmakers to sanction attorneys and parties for misconduct. Sanctions can include admonitions, monetary fines, and preclusion from appearing before the agency. Agencies should have a mechanism for administrative review of any sanctions.

18. *Open Hearings.* Agencies should adopt the presumption that their hearings are open to the public, while retaining the ability to close the hearings in particular cases, including when the public interest in open proceedings is outweighed by the need to protect:

- a. National security;
- b. Law enforcement;
- c. Confidentiality of business documents; and

⁹ Agencies should refer to Recommendation 86-1, Nonlawyer Assistance and Representation, 51 Fed. Reg. 25,641 (June 16, 1986), available at <https://www.acus.gov/recommendation/nonlawyer-assistance-and-representation>, when establishing or improving their procedures related to non-lawyer representation.

¹⁰ Agencies should refer to Recommendation 2016-6, Self-Represented Parties in Administrative Hearings, __ Fed. Reg. __ (Dec. __, 2016), available at <https://www.acus.gov/recommendation/self-represented-parties-administrative-proceedings-final-recommendation>, when establishing or improving their procedures related to self-represented parties.

d. Privacy of the parties to the hearing.

19. *Adjudicators.* Agencies that decide a significant number of cases should use adjudicators—rather than agency heads, boards, or panels—to conduct hearings and provide initial decisions, subject to higher-level review (see paragraph 26).

20. *Video Teleconferencing and Telephone Hearings.* Agencies should consult the Administrative Conference’s recommendations¹¹ in determining whether and when to conduct hearings or parts of hearings by video conferencing or telephone.

21. *Written-Only Hearings.* Procedural regulations should allow agencies to make use of written-only hearings in appropriate cases. Particularly good candidates for written-only hearings include those that solely involve disputes concerning:

- a. Interpretation of statutes or regulations; or
- b. Legislative facts as to which experts offer conflicting views.

Agencies should also consider the adoption of procedures for summary judgment in cases in which there are no disputed issues of material fact.

22. *Oral Argument.* Agencies generally should permit oral argument in connection with a written-only hearing if a party requests it, while retaining the discretion to dispense with oral argument if it appears to be of little value in a given case or parts of a case.

¹¹ Agencies should refer to Recommendation 2011-4, Agency Use of Video Hearings: Best Practices and Possibilities for Expansion, 76 Fed. Reg. 48,795 (Aug. 9, 2011), available at <https://www.acus.gov/recommendation/agency-use-video-hearings-best-practices-and-possibilities-expansion>; Recommendation 2014-7, Best Practices for Using Video Teleconferencing for Hearings, 79 Fed. Reg. 75,119 (Dec. 17, 2014), available at <https://www.acus.gov/recommendation/best-practices-using-video-teleconferencing-hearings>; and the Conference’s Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings, available at <https://www.acus.gov/report/handbook-best-practices-using-video-teleconferencing-adjudicatory-hearings>, when establishing or improving their video teleconferencing hearings.

23. *Evidentiary Rules.* Procedural regulations should prescribe the evidentiary rules the decisionmaker will apply in order to avoid confusion and time-consuming evidentiary disputes.¹²

24. *Opportunity for Rebuttal.* Agencies should allow an opportunity for rebuttal, which can take the form of cross-examination of an adverse witness as well as additional written or oral evidence. Agencies should have the discretion to limit or preclude cross-examination or have it be conducted in camera in appropriate cases, such as when:

- a. The dispute concerns a question of legislative fact where the evidence consists of expert testimony;
- b. Credibility is not at issue;
- c. The only issue is how a decisionmaker should exercise discretion;
- d. National security could be jeopardized; or
- e. The identity of confidential informants might be revealed.

Post-Hearing Practices

25. *Decisions.* Procedural regulations should require the decisionmaker to provide a written or transcribable decision and specify the contents of the decision. The decision should include:

- a. Findings of fact, including an explanation of how the decisionmaker made credibility determinations; and

¹² Agencies should refer to Recommendation 86-2, Use of Federal Rules of Evidence in Federal Agency Adjudications, 51 Fed. Reg. 25,642 (June 16, 1986), available at <https://www.acus.gov/recommendation/use-federal-rules-vidence-federal-agency-adjudications>, when considering whether or how to use the Federal Rules of Evidence.

- b. Conclusions of law, including an explanation of the decisionmaker's interpretation of statutes and regulations.
- 26. *Higher-Level Review.* Apart from any opportunity for reconsideration by the initial decisionmaker, procedural regulations should provide for a higher-level review of initial adjudicatory decisions. Agencies should give parties an opportunity to file exceptions and make arguments to the reviewing authority. The reviewing authority should be entitled to summarily affirm the initial decision without being required to write a new decision.
- 27. *Precedential Decisions.* Procedural regulations should allow and encourage agencies to designate decisions as precedential in order to improve decisional consistency. These decisions should be published on the agency's website to meet the requirements of 5 U.S.C. § 552.

Management of Procedures

- 28. *Complete Statement of Important Procedures.* Agencies should set forth all important procedures and practices that affect persons outside the agency in procedural regulations that are published in the Federal Register and the Code of Federal Regulations and posted on the agency website.
- 29. *Manuals and Guides.* Agencies should provide practice manuals and guides for decisionmakers, staff, parties, and representatives in which they spell out the details of the proceeding and illustrate the principles that are set forth in regulations. These manuals and guides should be written in simple, non-technical language and contain examples, model forms, and checklists, and they should be posted on the agency website.

30. *Review of Procedures.* Agencies should periodically re-examine and update their procedural regulations, practice manuals, and guides.

31. *Feedback.* Agencies should seek feedback from decisionmakers, staff, parties, representatives, and other participants in order to evaluate and improve their adjudicatory programs.

Administrative Conference Recommendation 2016-5

The Use of Ombuds in Federal Agencies

Adopted December 14, 2016

This recommendation updates and expands on the Administrative Conference’s earlier Recommendation 90-2, *The Ombudsman in Federal Agencies*, adopted on June 7, 1990. That document concentrated on “external ombudsmen,” those who primarily receive and address inquiries and complaints from the public, and was formulated before “use of ombuds” was added to the definition of “means of alternative dispute resolution” in the Administrative Dispute Resolution Act (ADRA)¹ in 1996. In 90-2, the Conference urged “the President and Congress to support federal agency initiatives to create and fund an effective ombudsman in those agencies with significant interaction with the public,” believing that those agencies would benefit from establishing either agency-wide or program-specific ombudsman offices.

The present recommendation is based on a study of the far broader array of federal ombuds² that have been established since the Conference’s earlier recommendation on this

¹ 5 U.S.C. § 571–84 (2012); *see id.* § 571(3) (2012).

² The term *ombudsman* is Scandinavian and means representative or proxy. Variations on the term exist in the field (ombudsmen, ombudsperson, ombuds, etc.). In this recommendation, the term “ombuds” will be used as the

subject. Federal ombuds now include multiple variations of both primarily externally-focused and primarily internally-focused ombuds (i.e., those who receive inquiries and complaints from persons within the agency). These individuals and offices can and do make a distinct and beneficial contribution to government effectiveness. While all forms of alternative dispute resolution expressly embraced by the ADRA have the capacity to reduce litigation costs and foster better relationships, the ombuds alone affords the constituent and the agency the opportunity to learn about and address issues before, in effect, they have been joined. Constituents and the agency are served by the ombuds' skilled, impartial assistance in resolution, and the agency is served by the opportunity for critical early warning of specific and systemic issues.

The research conducted to support this recommendation, including quantitative and qualitative surveys, interviews, case studies and profiles, revealed that federal ombuds can add value to their agencies in a variety of ways.³ Ombuds (1) identify significant new issues and patterns of concerns that are not well known or being ignored; (2) support significant procedural changes; (3) contribute to significant cost savings by dealing with identified issues, often at the earliest or pre-complaint stages, thereby reducing litigation and settling serious disputes; (4) prevent problems through training and briefings; (5) serve as an important liaison between colleagues, units, or agencies; and (6) provide a fair process for constituents.

predominant term to be as inclusive as possible. For historical background on the use of ombuds in other countries and their potential value in the United States, see WALTER GELLHORN, *OMBUDSMEN AND OTHERS: CITIZEN PROTECTORS IN NINE COUNTRIES* (1966); WALTER GELLHORN, *WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES* (1966).

³ Carole Houk et al., *A Reappraisal — The Nature and Value of Ombudsmen in Federal Agencies*, available at www.acus.gov/research-projects/ombudsman-federal-agencies-0.

Externally-facing ombuds were more likely to report supporting the agency with specific mission-related initiatives; helping the agency to improve specific policies, procedures, or structures; making administrative decisions to resolve specific issues; helping within the agency to keep its organizational processes coordinated; and advocating on behalf of individuals. Internally-facing ombuds were more likely to report helping constituents by providing a safe way to discuss perceptions of unsafe or illegal behavior; promoting the use of fair and helpful options; helping to prevent problems by coaching one-on-one; and providing group training and briefings to constituents. Whistleblower ombuds and procurement ombuds—consonant with their particular focus on more narrowly defined responsibilities—described their accomplishments as providing specific information and education, and guidance about very specific matters of concern to their constituents.

Since the Conference last considered ombuds in the federal government, the milieu in which government operates has, by all accounts, become more polarized, with government itself often the target of suspicion and hostility. In a challenging environment in which many federal agencies struggle to maintain the trust of the public they serve and even of their own employees, the ombuds is uniquely situated to provide both pertinent information and assistance in resolving issues to constituents and the agency alike. The ability of the ombuds to provide a place perceived as safe — which can offer a ready, responsive, and respectful hearing and credible options — in itself builds trust. And trust is a commodity without which government in a democratic society cannot function effectively.

Accordingly, the Conference continues to urge Congress and the President to create, fund, and otherwise support ombuds offices across the government consistent with the recommendation articulated below. Further, the Conference urges those agencies that already

have ombuds, and those that are contemplating creating ombuds offices, to align their office standards and practices with those included in this recommendation. In general, the Conference recommends these practices to the extent applicable in particular situations, regardless of whether an ombuds office or program is created by Congress or by an agency.

Although functionally the federal ombuds landscape is quite diverse, most federal ombuds share three *core standards of practice*—independence, confidentiality, and impartiality—and share common characteristics. The core standards are set forth in the standards adopted by the American Bar Association (ABA),⁴ the International Ombudsman Association (IOA),⁵ and the United States Ombudsman Association (USOA),⁶ though with some variations, particularly with respect to confidentiality. These organizations’ standards are generally followed, as applicable, and considered essential by the ombuds profession, both within and outside government. The further an ombuds office and the agency in which it resides deviate from the three core standards in practice, the more difficult it will be to defend whatever confidentiality the office does offer should it be subjected to legal challenge.

Most federal ombuds also share the following common characteristics: (1) Ombuds do not make decisions binding on the agency or provide formal rights-based processes for redress; (2) they have a commitment to fairness; and (3) they provide credible processes for receiving,

⁴ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (2004) (hereinafter “ABA STANDARDS”), *available at* <https://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/115.authcheckdam.pdf>.

⁵ IOA STANDARDS OF PRACTICE (2009), *available at* https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf.

⁶ USOA GOVERNMENTAL OMBUDSMAN STANDARDS (2003), *available at* <https://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-STANDARDS1.pdf>.

reviewing, and assisting in the resolution of issues. The three core standards and these common characteristics, taken together, are central to the ombuds profession.

Agencies have the authority to establish ombuds offices or programs. Although legislation establishing a generally applicable template and standards for federal ombuds has not been enacted, the 1996 addition of the words “use of ombuds” to the definition of “means of alternative dispute resolution” in ADRA clarifies that, when the ombuds office is assisting in the resolution of issues that are raised to it under its mandate, it is covered by the Act’s provisions.⁷ The Act’s coverage attaches to communications that take place when the constituent first approaches the ombuds office with an issue and continues to cover communications that occur until the case is, in effect, closed.⁸ While ADRA’s definition of “alternative means of dispute resolution” includes use of ombuds, federal agency ombuds programs would benefit from certain targeted amendments to ADRA to clarify certain definitions (e.g., “issue in controversy,” “neutral,” “party”) and other provisions as they apply to the work of ombuds, to expressly align them with current practice.

⁷ Further, ombuds are “neutrals” within the meaning of the Act including those ombuds who, after impartial review, advocate for specific processes or outcomes. *See* ABA STANDARDS, *supra* note 4, at 14.

⁸ The Act’s coverage is generally understood to begin at intake in alternative dispute resolution offices and continue until closure even when the constituent’s interaction with the office ends without a session process involving both parties. For example, guidance concerning ADRA confidentiality issued by the Federal Alternative Dispute Resolution Council in 2000 concluded that ADRA confidentiality applies to the intake and convening stages of ADR. *See* Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085, 83,090 (Dep’t of Justice Dec. 29, 2000). Further, the Interagency ADR Working Group Steering Committee in its Guide states that ADR program administrators are “neutrals when they are helping the parties resolve their controversy by, for example, discussing ADR options with the parties, coaching, and preparing them to negotiate” *See* Interagency ADR Working Group Steering Comm., Protecting the Confidentiality of Dispute Resolution Proceedings 8 (2006). While ADRA covers dispute resolution communications occurring through the duration of the case, the neutral’s obligation to maintain this confidentiality does not end with the closure of the case.

The research for this recommendation also identified three areas of potential conflict between (a) the requirements of ADRA § 574 and the scope of confidentiality that ombuds offer to constituents and (b) other legal requirements that may be applicable in certain situations. Federal ombuds should be aware of these matters and how they may affect particular ombuds programs:

(a) The relationships among their statutory duties to report information, the requirements of ADRA § 574(a)(3) on confidentiality, their agency's mission, and the professional standards to which they adhere. Any latitude they may have under ADRA § 574(d)(1) should be considered in reaching an understanding within the agency and with constituents of the breadth and limits of confidentiality consistent with statutory requirements.

(b) The requirements and interrelationship of the Federal Records Act,⁹ the Freedom of Information Act,¹⁰ and the Privacy Act,¹¹ with regard to agency records and other documentation.

(c) The effect on confidentiality of the Federal Service Labor-Management Relations Statute,¹² pursuant to which the union may be entitled to notice and an opportunity to be present at meetings with bargaining unit employees (for those ombuds that have employees with a collective bargaining representative among their constituents, or who may have cause, in the course of resolving issues that have been brought to them, to engage with represented employees

⁹ 44 U.S.C. Chaps. 21, 22, 29, 31, and 33.

¹⁰ 5 U.S.C. § 552 (2012).

¹¹ *Id.* § 552a.

¹² *Id.* §§ 7101–35; *see id.* § 7114.

as well as management on issues affecting the terms and conditions of bargaining unit employees).

In addition, this recommendation addresses standards applicable to federal agency ombuds offices and related issues involved in creating such offices. The practices included in this recommendation are intended to highlight some overarching beneficial practices observed among federal ombuds and to supplement the recommended practices and guidance available from various ombuds professional organizations.

To foster continual improvement and accountability of individual ombuds offices, the recommendation advises that each ombuds office arrange for periodic evaluation of its management and program effectiveness. Evaluation of ombuds by colleagues within the office can be useful if the office is of sufficient size to make this feasible. Otherwise, any external evaluation should be conducted by individuals knowledgeable about the roles, functions, and standards of practice of federal ombuds. For example, peer evaluation using the expertise of similar types of ombuds in other offices or agencies, or by outside ombuds professionals, may be suitable.

Finally, the recommendation urges the designation of an entity to serve as a government-wide resource to address certain issues of common concern among agency ombuds that transcend organizational boundaries.

Recommendation

1. Establishment and Standards.

- a. Agencies should consider creating additional ombuds offices to provide places perceived as safe for designated constituents to raise issues confidentially and

receive assistance in resolving them without fear of retribution. They should ensure that the office is able to, and does, adhere to the three core standards of independence, confidentiality, and impartiality, as these standards are described in generally recognized sets of professional standards, which include those adopted by the American Bar Association, the International Ombudsman Association, and the United States Ombudsman Association, and they should follow, to the extent applicable, the procedural recommendations below. Existing offices with the ombuds title that do not adhere to these standards should consider modifying their title, where permitted, to avoid any confusion.

- b. Ombuds offices created by executive action should be established or governed by a charter or other agency-wide directive specifying the office's mandate, standards, and operational requirements, so that others in the agency and the public are aware of the office's responsibilities.

2. Legislative Considerations.

- a. Congress should consider creating additional ombuds offices. When Congress creates a new ombuds program, it should observe the procedural principles contained in this recommendation, to the extent applicable.
- b. Any action by Congress creating or affecting the operations of agency ombuds offices, whether through amendment of the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. §§ 571–84, or other legislative action, should reinforce the core standards of independence, confidentiality, and impartiality. Any such actions should maintain clarity and uniformity of definitions and purpose for federal agency ombuds, while allowing for differences in constituencies (whether

primarily internal or external), type of office (advocate, analytic, organizational, etc.), and agency missions.

3. *Leadership Support.*

- a. Agency leadership should provide visible support, renewed as leadership changes, for the role of ombuds offices in the agency and their standards, including independence, confidentiality, and impartiality.
- b. Agency leadership should consider carefully any specific recommendations for improved agency performance that are provided by agency ombuds.

4. *Independence.*

- a. To promote the effectiveness and independence of ombuds offices, agencies should consider structuring ombuds offices so that they are perceived to have the necessary independence and are separate from other units of the agency. To ensure adequate support from agency leadership, ombuds offices should report to an agency official at the highest level of senior leadership. Ombuds offices should not have duties within the agency that might create a conflict with their responsibilities as a neutral, and their budgets should be publicly disclosed.
- b. The agency should ensure that the ombuds has direct access to the agency head and to other senior agency officials, as appropriate. Whether by statute, regulation, or charter, ombuds should expressly be given access to agency information and records pertinent to the ombuds' responsibilities as permitted by law.

- c. Ombuds and the agencies in which they are located should clearly articulate in all communications about the ombuds that the ombuds office is independent and specifically not a conduit for notice to the agency.
- d. Federal ombuds should not be subject to retaliation, up to and including removal from the ombuds office, based on their looking into and assisting with the resolution of any issues within the ombuds' area of jurisdiction.

5. *Confidentiality.*

- a. Consistent with the generally accepted interpretation of ADRA § 574, as applied to alternative dispute resolution offices, agencies should understand and support that the Act's requirements for confidentiality attach to communications that occur at intake and continue until the issue has been resolved or is otherwise no longer being handled by the ombuds, whether or not the constituent ever engages in mediation facilitated by the ombuds office. Restrictions on disclosure of such communications, however, should not cease with issue resolution or other indicia of closure within the ombuds office.
- b. Agencies (or other authorizers) should articulate the scope and limits of the confidentiality offered by ombuds offices in their enabling documents (whether statute, regulation, charter or other memoranda), as well as on the agency website, in brochures, and in any other descriptions or public communications about the office utilized by the office or the agency.
- c. Agency leadership and management should not ask for information falling within the scope of confidentiality offered by the ombuds office.

- d. If information is requested from an ombuds during discovery in litigation, or in the context of an internal administrative proceeding in connection with a grievance or complaint, then the ombuds should seek to protect confidentiality to the fullest extent possible under the provisions of ADRA § 574, unless otherwise provided by law. Agencies should vigorously defend the confidentiality offered by ombuds offices.
6. *Impartiality.* Ombuds should conduct inquiries and investigations in an impartial manner, free from conflicts of interest. After impartial review, ombuds may appropriately advocate with regard to process. An ombuds established with advocacy responsibilities may also advocate for specific outcomes.
7. *Legal Issues.* Federal ombuds should consider potential conflicts in the following areas:
 - a. The relationships among their statutory duties to report information, the requirements of ADRA § 574(a)(3) on confidentiality, their agency's mission, and the professional standards to which they adhere.
 - b. The requirements and interrelationship of the Federal Records Act, the Freedom of Information Act, and the Privacy Act, with regard to agency records and other documentation.
 - c. The effect on confidentiality of the provision in the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7114, where applicable, pursuant to which the union may be entitled to notice and an opportunity to be present at meetings with bargaining unit employees.
8. *Staffing.*

- a. Agencies should reinforce the credibility of federal ombuds by appointment of ombuds with sufficient professional stature, who also possess the requisite knowledge, skills, and abilities. This should include, at a minimum, knowledge of informal dispute resolution practices as well as, depending on the office mandate, familiarity with process design, training, data analysis, and facilitation and group work with diverse populations. Agency ombuds offices should also seek to achieve the necessary diversity of ombuds skills and backgrounds on their staffs to credibly handle all matters presented to the office.
- b. While the spectrum of federal ombuds is too diverse to recommend a single federal position classification, job grade, and set of qualifications, agencies and the Office of Personnel Management should consider working collaboratively, in consultation with the relevant ombuds professional associations, to craft and propose appropriate job descriptions, classifications, and qualifications, as set forth in the preceding subsection, covering the major categories of federal ombuds.

9. *Training and Skills.*

- a. To promote accountability and professionalism, agencies should provide training to ombuds with regard to standards and practice, whether offered by one of the ombuds professional organizations or working groups, or from within the government.
- b. Ombuds should identify steps to build general competency and confidence within the office and to provide specific support to ombuds when cases become highly emotional or complex. More generally, as a regular practice to support and

improve their skills, federal ombuds should participate in relevant professional working groups or ombuds association training programs.

- c. Ombuds offices should consider the use of developmental assignments via details to other agencies or offices, as appropriate, supplemented by mentoring, which can be helpful as part of their training program.
10. *Access to Counsel.* To protect the independence and confidentiality of federal ombuds, agencies should ensure, consistent with available resources, that ombuds have access to legal counsel for matters within the purview of the ombuds, whether provided within the agency with appropriate safeguards for confidentiality, by direct hiring of attorneys by the ombuds office, or under an arrangement enabling the sharing across agencies of counsel for this purpose. Such counsel should be free of conflicts of interest.
11. *Physical Facilities.* To reinforce confidentiality and the perception of independence, to the fullest extent possible and consistent with agency resources, the agency should ensure that the physical ombuds office and telephonic and online communications systems and documentation enable discreet meetings and conversations.
12. *Evaluation.* Each ombuds office should, as a regular professional practice, ensure the periodic evaluation of both office management and program effectiveness for the purposes of continual improvement and accountability.
13. *Providing Information.*
 - a. Ombuds offices should provide information about relevant options to visitors to the ombuds office, including formal processes for resolving issues, and their requirements, so that visitors do not unintentionally waive these options by virtue of seeking assistance in the ombuds office. Correspondingly, ombuds offices

should not engage in behavior that could mislead employees or other visitors about the respective roles of the ombuds and those entities that provide formal complaint processes.

- b. Agencies should disclose publicly on their websites the identity, contact information, statutory or other basis, and scope of responsibility for their ombuds offices, to the extent permitted by law.
- c. Agency ombuds offices should explore ways to document for agency senior leadership, without breaching confidentiality, the value of the use of ombuds, including identification of systemic problems within the agency and, where available, relevant data on cost savings and avoidance of litigation.

14. *Records Management.* Federal ombuds offices should work with agency records officials to ensure appropriate confidentiality protections for the records created in the course of the office's work and to ensure that ombuds records are included in appropriate records schedules.

15. *Agency-wide Considerations.*

- a. Ombuds offices should undertake outreach and education to build effective relationships with those affected by their work. Outreach efforts should foster awareness of the services that ombuds offer, to promote understanding of ombuds (and agency) processes and to ensure that constituents understand the role of the ombuds and applicable standards.
- b. To ensure that there is a mutual understanding of respective roles and responsibilities within the agency, ombuds offices should work proactively with other offices and stakeholders within their agencies to establish protocols for

referrals and overlap, to build cooperative relationships and partnerships that will enable resolutions, and to develop internal champions. Such initiatives also help the ombuds to identify issues new to the agency, as well as patterns and systemic issues, and to understand how the ombuds can use the resources available to add the most value. Outreach should be ongoing to keep up with the turnover of agency officials and constituents and should utilize as many communications media as appropriate and feasible.

16. *Interagency Coordination.* An entity should be designated to serve as a central resource for agency ombuds to address matters of common concern.

Administrative Conference Recommendation 2016-6

Self-Represented Parties in Administrative Proceedings

Adopted December 14, 2016

Federal agencies conduct millions of proceedings each year, making decisions that affect such important matters as disability or veterans' benefits, immigration status, and home or property loans. In many of these adjudications, claimants appear unrepresented for part or all of the proceeding and must learn to navigate hearing procedures, which can be quite complex, without expert assistance. The presence of self-represented parties¹ in administrative proceedings can create challenges for both administrative agencies and for the parties seeking

¹ The term "self-represented" is used to denote parties who do not have professional representation, provided by either a lawyer or an experienced nonlawyer. Representation by a non-expert family member or friend is included in this recommendation's use of the term "self-represented." Administrative agencies generally use the term "self-represented," in contrast to courts' use of the term *pro se*. Because this recommendation focuses on agency adjudication, it uses the term "self-represented," while acknowledging that the two terms are effectively synonymous.

agency assistance. Further, the presence of self-represented parties raises a number of concerns relating to the consistency of outcomes and the efficiency of processing cases.

Because of these concerns, in the spring of 2015 the Department of Justice's Access to Justice Initiative asked the Administrative Conference to co-lead a working group on self-represented parties in administrative proceedings, and the Conference agreed. The working group, which operates under the umbrella of the Legal Aid Interagency Roundtable (LAIR), has been meeting since that time.² During working group meetings, representatives from a number of agencies, including the Social Security Administration (SSA), Executive Office for Immigration Review (EOIR), Board of Veterans' Appeals (BVA), Internal Revenue Service (IRS), Department of Health and Human Services (HHS), Department of Agriculture (USDA), and Department of Housing and Urban Development (HUD) participated and shared information about their practices and procedures relating to self-represented parties. In working group meetings, agency representatives agreed that proceedings involving self-represented parties are challenging, and expressed interest both in learning more about how other agencies and courts handle self-represented parties and in improving their own practices. This recommendation, and its accompanying report,³ arose in response to those concerns.⁴

² LAIR was established in 2012 by the White House Domestic Policy Council and the Department of Justice. *See White House Legal Aid Interagency Roundtable*, U.S. DEP'T OF JUST., <https://www.justice.gov/lair> (last visited Aug. 16, 2016). It was formalized by presidential memorandum in the fall of 2015. *See* Memorandum from the President to the Heads of Exec. Dep'ts and Agencies (Sept. 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/24/presidential-memorandum-establishment-white-house-legal-aid-interagency>.

³ Connie Vogelmann, *Self-Represented Parties in Administrative Hearings* (Sept. 7, 2016), <https://www.acus.gov/sites/default/files/documents/Self-Represented-Parties-Administrative-Hearings-Draft-Report.pdf>.

⁴ This recommendation primarily targets the subset of administrative agencies that conduct their own administrative hearings. Components of a number of federal agencies—including HUD, HHS, and USDA—do not conduct

While civil courts have long recognized and worked to address the challenges introduced by the presence of self-represented parties, agencies have increasingly begun to focus on issues relating to self-representation only in recent years. Agencies are undertaking numerous efforts to accommodate self-represented parties in their adjudication processes.⁵ Yet quantitative information on self-representation in the administrative context is comparatively scarce, and there is much insight to be gained from the civil courts in identifying problems and solutions pertaining to self-representation. Although there are important differences between procedures in administrative proceedings and those in civil courts, available information indicates that the two contexts share many of the same problems—and solutions—when dealing with self-represented parties.

Challenges related to self-represented parties in administrative proceedings can be broken down into two main categories: those pertaining to the efficiency of the administrative proceeding and those relating to the outcome of the procedure.

From an efficiency standpoint, self-represented parties' lack of familiarity with agency procedures and administrative processes can cause delay both in individual cases and on a systemic level. Delays in individual cases may arise when self-represented parties fail to appear for scheduled hearings, file paperwork incorrectly or incompletely, do not provide all relevant evidence, or make incoherent or legally irrelevant arguments before an adjudicator. In the aggregate, self-represented parties also may require significant assistance from agency staff in filing their claims and appeals, which can be challenging given agencies' significant resource

hearings directly, and instead delegate adjudication responsibilities to state or local entities. Because the challenges facing these components are quite distinct, they are not addressed in this recommendation.

⁵ *Id.* at 28–50.

constraints. Finally, self-represented parties may create challenges for adjudicators, who may struggle to provide appropriate assistance to them while maintaining impartiality and the appearance of impartiality. These problems are exacerbated by the fact that many agencies hear significant numbers of cases by self-represented parties each year.

Self-represented parties also may face suboptimal outcomes in administrative proceedings compared to their represented counterparts, raising issues of fairness. Even administrative procedures that are designed to be handled without trained representation can be challenging for inexperienced parties to navigate, particularly in the face of disability or language or literacy barriers. Furthermore, missed deadlines or hearings may result in a self-represented party's case being dismissed, despite its merits. Self-represented parties often struggle to effectively present their cases and, despite adjudicators' best efforts, may receive worse results than parties with representation.

Civil courts face many of these same efficiency and consistency concerns, and in response have implemented wide-ranging innovations to assist self-represented parties. These new approaches have included in-person self-service centers; workshops explaining the process or helping parties complete paperwork; and virtual services such as helplines accessible via phone, email, text, and chat. Courts have also invested in efforts to make processes more accessible to self-represented parties from the outset, through the development of web resources, e-filing and document assembly programs, and plain language and translation services for forms and other documents. Finally, courts have also used judicial resources and training to support judges and court personnel in their efforts to effectively and impartially support self-represented parties.

These innovations have received extremely positive feedback from parties, and early reports indicate that they improve court efficiency and can yield significant cost savings for the judiciary.⁶ Administrative agencies have also implemented, or are in the process of implementing, many similar innovations.⁷ For instance, some agencies make use of pre-hearing conferences to reduce both the necessity and the complexity of subsequent hearings.⁸

This recommendation builds on the successes of both civil courts and administrative agencies in dealing with self-represented parties and makes suggestions for further improvement. In making this recommendation, the Conference makes no normative judgment on the presence of self-represented parties in administrative proceedings. This recommendation assumes that there will be circumstances in which parties will choose to represent themselves, and seeks to improve the resources available to those parties and the fairness and efficiency of the overall administrative process.

The recommendation is not intended to be one-size-fits-all, and not every recommendation will be appropriate for every administrative agency. To the extent that this recommendation requires additional expenditure of resources by agencies, innovations are likely to pay dividends in increased efficiency and consistency of outcome in the long term.⁹ The goals of this recommendation are to improve both the ease with which cases involving self-represented parties are processed and the consistency of the outcomes reached in those cases.

⁶ Richard Zorza, *Trends in Self-Represented Litigation Innovation*, in FUTURE TRENDS IN STATE COURTS 85 (Carol R. Flango et al. eds., 2006). *See generally* JOHN GREACEN, THE BENEFITS AND COSTS OF PROGRAMS TO ASSIST SELF-REPRESENTED LITIGANTS (2009).

⁷ Vogelmann, *supra* note 3, at 28–50.

⁸ *Id.* at 32–33.

⁹ *See generally* GREACEN, *supra* note 6.

Recommendation

Agency Resources

1. Agencies should consider investigating and implementing triage and diagnostic tools to direct self-represented parties to appropriate resources based on both the complexity of their case and their individual level of need. These tools can be used by self-represented parties themselves for self-diagnosis or can be used by agency staff to improve the consistency and accuracy of information provided.
2. Agencies should strive to develop a continuum of services for self-represented parties, from self-help to one-on-one guidance, that will allow parties to obtain assistance by different methods depending on need. In particular, and depending on the availability of resources, agencies should:
 - a. Use websites to make relevant information available to the public, including self-represented parties and entities that assist them, to access and expand e-filing opportunities;
 - b. Continue efforts to make forms and other important materials accessible to self-represented parties by providing them at the earliest possible stage in the proceeding in plain language, in both English and in other languages as needed, and by providing effective assistance for persons with special needs; and
 - c. Provide a method for self-represented parties to communicate in “real-time” with agency staff or agency partners, as appropriate.

3. Subject to the availability of resources and as permitted by agency statutes and regulations, agencies should provide training for adjudicators for dealing with self-represented parties, including providing guidance for how they should interact with self-represented parties during administrative proceedings. Specifically, training should address interacting with self-represented parties in situations of limited literacy or English proficiency or mental or physical disability.

Data Collection and Agency Coordination

4. Agencies should strive to collect the following information, subject to the availability of resources, and keeping in mind relevant statutes including the Paperwork Reduction Act, where applicable. Agencies should use the information collected to continually evaluate and revise their services for self-represented parties. In particular, agencies should:
 - a. Seek to collect data on the number of self-represented parties in agency proceedings. In addition, agencies should collect data on their services for self-represented parties and request program feedback from agency personnel.
 - b. Seek to collect data from self-represented parties about their experiences during the proceeding and on their use of self-help resources.
 - c. Strive to keep open lines of communication with other agencies and with civil courts, recognizing that in spite of differences in procedures, other adjudicators have important and transferable insights in working with self-represented parties.

Considerations for the Future

5. In the long term, agencies should strive to re-evaluate procedures with an eye toward accommodating self-represented parties. Proceedings are often designed to accommodate attorneys and other trained professionals. Agencies should evaluate the feasibility of navigating their system for an outsider, and make changes—as allowed by their organic statutes and regulations—to simplify their processes accordingly. Although creation of simplified procedures would benefit all parties, they would be expected to provide particular assistance to self-represented parties.